

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Mid-Rivers Telephone Cooperative, Inc.	)	WC Docket No. 02-78
for Order Declaring It To Be an Incumbent	)	
Local Exchange Carrier in Terry, Montana	)	
Pursuant to Section 251(h)(2)	)	

**COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.**

Andrew D. Crain  
Timothy M. Boucher  
Qwest Communications  
International Inc.  
Suite 950  
607 14<sup>th</sup> Street, N.W.  
Washington, DC 20005  
(303) 383-6608

December 30, 2004

Its Attorneys

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY .....	1
II. BACKGROUND .....	3
III. WHATEVER SOLUTION THE COMMISSION ADOPTS, IT SHOULD NOT CREATE A COMPETITIVE ADVANTAGE SUBSIDY BY ALLOWING MID-RIVERS TO INCREASE ITS UNIVERSAL SERVICE SUPPORT AND SHOULD ADDRESS ACCESS RATES IN ANOTHER DOCKET .....	4
IV. WHATEVER SOLUTION THE COMMISSION ADOPTS, QC SHOULD NO LONGER HAVE UNBUNDLING OBLIGATIONS IN TERRY AND MID-RIVERS SHOULD NOT HAVE THE BENEFITS OF ILEC STATUS WITHOUT UNBUNDLING OBLIGATIONS .....	9
V. UNDER THE ACT, THE SOLUTION TO THE COMPETITIVE CIRCUMSTANCES PRESENTED BY THE MID-RIVERS PETITION IS TO ELIMINATE ILEC UNBUNDLING OBLIGATIONS BECAUSE THE MARKET HAS ELIMINATED THE NEED FOR ANY ILEC DESIGNATION .....	10
A. In The Circumstances Presented By The Mid-Rivers Petition, The Relevant Area Is Necessarily Competitive And No Carrier Is Dominant .....	10
B. In The Circumstances Presented By The Mid-Rivers Petition, The Legacy ILEC's Unbundling Obligations Should Be Removed Automatically .....	10
VI. IN THE ALTERNATIVE, SECTION 10 FORBEARANCE IS THE APPROPRIATE MECHANISM TO ADDRESS THE STATUS OF THE ILEC IN THE CIRCUMSTANCES PRESENTED BY THE MID-RIVERS PETITION.....	11
A. The Section 10 Criteria For Forbearance.....	11
B. Instead Of Re-Classifying Mid-Rivers As An ILEC, The Commission Should Forbear From Regulating Qwest As An ILEC In Terry, Including Forbearance From Applying Specific Section 251(c) And 271 Regulatory Requirements And Dominant Carrier Regulation.....	12
VII. THE COMMISSION SHOULD ESTABLISH RULES AND STANDARDS TO IMPLEMENT EITHER APPROACH DESCRIBED ABOVE.....	15
VIII. CONCLUSION.....	16

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Mid-Rivers Telephone Cooperative, Inc.	)	WC Docket No. 02-78
for Order Declaring It To Be an Incumbent	)	
Local Exchange Carrier in Terry, Montana	)	
Pursuant to Section 251(h)(2)	)	

**COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.**

Qwest Communications International Inc., through counsel and on behalf of itself and its affiliates, including Qwest Corporation (“QC”) (collectively, “Qwest”), hereby submits the following comments in response to the Federal Communications Commission’s (the “Commission’s”) *Notice of Proposed Rulemaking* (the “NPRM”) requesting comment with respect to the Petition of Mid-Rivers Cooperative, Inc. (the “Mid-Rivers Petition”) seeking an order declaring it to be an incumbent local exchange carrier (“ILEC”) in Terry, Montana pursuant to Section 251(h)(2) of the 1996 Telecommunications Act (the “Act”).<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

The Mid-Rivers Petition presents another variation on a familiar theme: regulatory challenges that arise due to the regulatory asymmetry that exists both between ILECs, like Qwest, and their competitors and between rural and non-rural incumbents. In its Petition, Mid-

---

<sup>1</sup> *In the Matter of Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It To Be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, WC Docket No. 02-78, *Notice of Proposed Rulemaking*, FCC 04-252, rel. Nov. 15, 2004. *And see Public Notice*, DA 04-3789, rel. Nov. 30, 2004. *See also*, Mid-Rivers Telephone Cooperative, Inc., Petition for Order Declaring Mid-Rivers Telephone Cooperative, Inc. an Incumbent Local Exchange Carrier in Terry, MT, WC Docket No. 02-78, filed Feb. 5, 2002.

Rivers contends that it now provides approximately 93%<sup>2</sup> of the access lines in the Terry exchange and that it has otherwise satisfied all the requirements of Section 251(h)(2). Because of this, Mid-Rivers contends it should be declared the ILEC in Terry. Mid-Rivers clearly seeks this status in order to obtain ILEC benefits in Terry (*e.g.*, the right to increased universal service support and to charge higher access fees) while avoiding ILEC burdens in Terry – namely, unbundling obligations under Section 251(c). Mid-Rivers no doubt hopes to avoid the latter by obtaining the rural LEC exemption set forth in Section 251(f)(1).

QC, Qwest's local exchange carrier affiliate, is the current ILEC in Terry. As such, despite it not being the dominant provider in Terry, QC is subject to all of the ILEC unbundling obligations imposed under Section 251(c) of the Act. While the Mid-Rivers Petition presumably would result in QC no longer being an ILEC in Terry, Mid-Rivers is not specific on this subject.

Qwest suggests that, in a case such as is presented by the Mid-Rivers Petition, the Commission should recognize the reality of competition in the market and declare that the market is sufficiently competitive that there no longer is any ILEC in the market. This would permit QC, Mid-Rivers and others to compete fairly without governmental skewing of the market in favor of a particular competitor. The Mid-Rivers Petition requests relief that would cause precisely such an unnecessary and unwarranted regulatory intrusion into a competitive market. In the circumstances presented by the Mid-Rivers Petition, where a second facilities-based carrier demonstrates that it has obtained significant market share previously held by the legacy ILEC in a given area, competition is unequivocally demonstrated and the legacy ILEC is clearly no longer a dominant carrier in that area. When this occurs, the primary significance under the Act should not be that the non-ILEC carrier be re-classified as the ILEC, but rather that

---

<sup>2</sup> See Mid-Rivers Petition at 2.

the legacy ILEC's unbundling obligations should automatically go away. This would essentially leave two competitive local exchange carriers ("CLECs") in the market with the ability to compete against each other. In the alternative, rather than re-classify Mid-Rivers as the ILEC in Terry pursuant to Section 251(h)(2), the Commission should forbear from regulating either QC or Mid-Rivers as the ILEC in Terry pursuant to Section 251(h)(1) and forbear as well from dominant carrier regulation and the specific unbundling and resale requirements of Section 251 and 271 in Terry.

Regardless of which solution is adopted, the Commission should not permit Mid-Rivers to obtain a competitive advantage subsidy by increasing its universal service support and it should adopt appropriate processes for what is likely to be an onslaught of similar petitions in the future.

## II. BACKGROUND

Section 251(h)(2) states that "[t]he Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if - (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section."<sup>3</sup>

Mid-Rivers demonstrates, in its Petition, that it has been able to compete effectively as a second facilities-based carrier in Terry, Montana. Indeed, Mid-Rivers contends that it now

---

<sup>3</sup> 47 U.S.C. § 251(h)(2).

serves 93% of the residence access lines and 93% of the business access lines in Terry.<sup>4</sup> It provides these services on its own facilities without reselling QC service or utilizing unbundled elements.<sup>5</sup> Mid-Rivers has been designated as an eligible telecommunications carrier (“ETC”) in Terry by the Montana Public Service Commission (“Montana PSC”) and, as a result, obtains the same universal service support as QC.<sup>6</sup> However, Mid-Rivers states that, if its Petition is granted, it intends to seek to incorporate Terry into its ILEC study area and the NECA tariff.<sup>7</sup> In other words, it will seek to increase its universal service support and seek the right to increase its access rates in Terry.

Recognizing that the Mid-Rivers Petition presents “novel and difficult questions implicating several of the Commission’s major policies including local competition, universal service, and access charges,” the Commission seeks comment regarding how Section 251(h)(2) should be applied to the Mid-Rivers Petition and to future petitions of this type.

**III. WHATEVER SOLUTION THE COMMISSION ADOPTS, IT SHOULD NOT CREATE A COMPETITIVE ADVANTAGE SUBSIDY BY ALLOWING MID-RIVERS TO INCREASE ITS UNIVERSAL SERVICE SUPPORT AND SHOULD ADDRESS ACCESS RATES IN ANOTHER DOCKET**

---

In its Petition, Mid-Rivers indicates that the relief sought in this Petition—to be declared the ILEC in the Terry exchange—is just a stepping stone toward incorporating the Terry exchange into its ILEC study area and the NECA tariff, each of which would have significant regulatory impacts. As discussed below, there are alternative solutions for addressing the

---

<sup>4</sup> *NPRM* ¶ 4.

<sup>5</sup> *Id.* It is notable that Mid-Rivers has overbuilt the concentrated customer area – the town of Terry, Montana – and QC continues to serve rural customers served by long loops and low concentration.

<sup>6</sup> *Id.* n.34.

<sup>7</sup> *Id.* n.50.

competitive circumstances presented by the Mid-Rivers Petition. However, whatever action the Commission takes, it must not lose sight of the fact that the ultimate relief that Mid-Rivers is pursuing is the incorporation of the Terry exchange into its ILEC study area and the NECA tariff. If the Commission allows this to occur, it would undermine the Commission's principles that all carriers competing for a given customer are entitled to the same universal service support. Section 251(h)(2) provides that the Commission may not treat a carrier as an ILEC in an area unless "such treatment is consistent with the public interest, convenience and necessity and the purposes of [Section 251]."<sup>8</sup> In order to satisfy this requirement, the Commission should prevent this "gaming of the system" by, at the very least, freezing universal service levels at existing levels.<sup>9</sup> Any additional universal service issues presented by the Mid-Rivers Petition or others like it should then be addressed in the universal service docket.<sup>10</sup> Finally, any access rate issues should be addressed in the intercarrier compensation docket, rather than this docket.<sup>11</sup>

Allowing Mid-Rivers to incorporate the Terry exchange into its study area presumably would entitle Mid-Rivers to universal service support in that exchange computed by the rural universal service support mechanism. This will result in much higher universal service support than it currently receives in the Terry exchange under the non-rural support mechanism and

---

<sup>8</sup> 47 U.S.C. § 251(h)(2)(C). The Commission asks, regarding the public interest requirement presented by 251(h)(2)(C), whether it should consider, in connection with the Mid-Rivers Petition, the potential benefit to consumers and competitors from Mid-Rivers' claimed facilities superiority. In short, the Commission should not consider this a factor. Even if true, Mid-Rivers' possession of a superior network only demonstrates that competition works. Mid-Rivers should not be permitted to use that factor as a reason to obtain competitive advantage subsidies via universal service and access charges that are not available to ILECs such as QC.

<sup>9</sup> As discussed below, it is also essential that Mid-Rivers not receive rural carrier status.

<sup>10</sup> See *In the Matter of Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking*, 19 FCC Rcd 10800 (2004).

<sup>11</sup> See *In the Matter of Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001).

adversely affect the ability of other carriers to provide service in that exchange as an ETC unless they serve Mid-Rivers' entire study area.<sup>12</sup> Furthermore, it is unclear whether the statute would require the state commission to apply a more stringent standard for allowing additional ETCs to be designated in the Terry exchange, given Mid-Rivers' status as a rural telephone company.<sup>13</sup>

Whatever action the Commission takes with respect to the Mid-Rivers Petition, it must ensure that universal service support continues to be distributed in a competitively-neutral manner in the Terry telephone exchange and in other similar situations. All carriers—Mid-Rivers, QC, or any other ETC—must receive the same universal service funding when serving a customer in the Terry exchange. The Commission has consistently held that the Act requires that the same level of universal service support be available to all ETCs serving customers in a particular geographic area. In the *First Report and Order*, the Commission established “competitive neutrality” as a fundamental principle underlying its implementation of section 254, dictating that the Commission’s universal service support mechanisms and rules must neither unfairly advantage nor unfairly disadvantage one provider over another.<sup>14</sup> Accordingly, the Commission made high cost universal service support “portable” to all ETCs serving customers in an ILEC’s study area.<sup>15</sup> In the *Ninth Report and Order*, the Commission reiterated this principle and specified that the same amount of universal service support should be available to competing ETCs: “To ensure competitive neutrality, we believe that a competitor that wins a high-cost customer from an incumbent LEC should be entitled to the same amount of support

---

<sup>12</sup> See *Opposition of Western Wireless Corporation*, WC Docket No. 02-78, filed May 6, 2002.

<sup>13</sup> There is a strong argument that this provision should not apply in this case, even if Mid-Rivers is treated as an ILEC.

<sup>14</sup> *In the Matter of Federal-State Joint Board on Universal Service, First Report and Order*, 12 FCC Rcd 8776, 8801-02 ¶¶ 46-48 (1997).

<sup>15</sup> *Id.* at 8932-34 ¶¶ 286-90.



that the incumbent would have received for the line, including any interim hold-harmless amount.”<sup>16</sup> The Commission reasoned that unequal federal funding could discourage competitive entry in high-cost areas and stifle a competitor’s ability to provide service at rates competitive to those of the incumbent.<sup>17</sup> Finally, in the *Rural Universal Service Order*, the Commission confirmed that the same portability rules apply to study areas served by rural ILECs.<sup>18</sup>

There is no basis for departing from this principle of competitive neutrality here. Allowing Mid-Rivers to receive more per-line support than QC in the Terry exchange would unfairly undermine QC’s ability to compete for customers in Terry.<sup>19</sup> Mid-Rivers asserts that it has already constructed outside plant facilities in Terry to provide basic telephone service and offers “significant additional services such as DSL, Internet, ITV to the school, and CLASS.”<sup>20</sup> Thus, in deciding to offer service in Terry, Mid-Rivers apparently believed it could profitably do so based on the universal service support available from the non-rural fund and has been able to do so based on its level of penetration. As noted above, allowing Mid-Rivers to obtain unjustified increases in its universal service support purely because it is a rural ILEC operating in a non-rural service area will create inefficient incentives for entry, as well as negative impacts on the rural support mechanism.

---

<sup>16</sup> *In the Matter of Federal-State Joint Board on Universal Service, Ninth Report and Order and Eighteenth Order on Reconsideration*, 14 FCC Rcd 20432, 20480 ¶ 90 (1999), *rev’d sub. nom. Qwest Corp. v. FCC*, 258 F.3d 1191 (10<sup>th</sup> Cir. 2001).

<sup>17</sup> *Id.*

<sup>18</sup> *In the Matter of Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256*, 16 FCC Rcd 11244, 11291 ¶ 114 (2001).

<sup>19</sup> In fact, Mid-Rivers already enjoys significant advantages over Qwest as a telephone cooperative, including tax exemptions and higher exchange access revenues.

<sup>20</sup> Mid-Rivers Petition at 2.

With respect to access charges, the Commission specifically asks, in the *NPRM*, for comment on whether the potential for access charge increases – given that CLECs are not allowed to tariff interstate access at rates higher than those of the ILEC – should figure into its public interest analysis.<sup>21</sup> The Mid-Rivers Petition raises important issues with respect to access rates. However, rather than trying to address these piecemeal in this proceeding, these issues should be addressed in the intercarrier compensation docket as part of any appropriate overall reform.

The concerns discussed above with respect to universal service and access rates are heightened by the fact that the Commission is likely to see an onslaught of these types of petitions. Qwest is aware of numerous areas within its ILEC service territory where a rural ILEC has overbuilt QC's local telephone network and gained a substantial market share. In Montana alone, Mid-Rivers and other rural ILECs have overbuilt and obtained substantial market share in at least three communities served by QC, and additional build-out is underway. For example, Three Rivers Telephone Cooperative began to offer service in 2002 in Shelby, Montana, which has more than 2,000 access lines.<sup>22</sup> Qwest expects that rural ILECs are likewise overbuilding in non-rural service territories in other parts of the country as well. While this trend is a sign of competitive health, it should not be rewarded with subsidies that create an unfair competitive advantage. If Mid-Rivers is treated as an ILEC in the Terry exchange and that treatment ultimately results in a dramatic increase in its universal service support, the Commission can expect rural carriers to file similar petitions for other areas they have overbuilt. Such a decision

---

<sup>21</sup> *NPRM* ¶ 12.

<sup>22</sup> See *\$5 Million Plant Coming to Shelby; 3 Rivers Building Phone Facility*, Great Falls Tribune (May 9, 2002) (stating that construction would begin in June 2002 with telephone, Internet and other services available as early as October).

will create incentives for rural ILECs to expand into adjacent areas simply to increase their universal service support, thus undermining the Commission's past efforts to avoid such outcomes. Cumulatively, these increases will only put further pressure on the rural universal service fund.

Regardless of which solution the Commission adopts, the Commission should, under no circumstances, establish a precedent whereby facilities-based CLECs that have been able to thrive and, in fact, dominate in a given area are able to subsidize their operations through increased universal support.<sup>23</sup>

IV. **WHATEVER SOLUTION THE COMMISSION ADOPTS, QC SHOULD NO LONGER HAVE UNBUNDLING OBLIGATIONS IN TERRY AND MID-RIVERS SHOULD NOT HAVE THE BENEFITS OF ILEC STATUS WITHOUT UNBUNDLING OBLIGATIONS**

The Mid-Rivers Petition also implicates the issue of whether the same unbundling requirements should apply to Mid-Rivers in the Terry exchange as apply to QC in that area, or, as Mid-Rivers will likely contend, it is subject to the exemption in Section 251(f)(1) of the Act. Whatever the Commission does with the Mid-Rivers Petition, it must avoid a result where QC retains unbundling obligations or where Mid-Rivers obtains the benefits of ILEC status without the attendant burdens (*i.e.*, unbundling obligations). This issue obviously parallels the universal service issue addressed above. The Commission should not let Mid-Rivers obtain a competitive advantage subsidy through this Petition.

---

<sup>23</sup> Both of the alternatives below would avoid these improper subsidies.

V. UNDER THE ACT, THE SOLUTION TO THE COMPETITIVE CIRCUMSTANCES PRESENTED BY THE MID-RIVERS PETITION IS TO ELIMINATE ILEC UNBUNDLING OBLIGATIONS BECAUSE THE MARKET HAS ELIMINATED THE NEED FOR ANY ILEC DESIGNATION

As discussed more fully below, the proper result under the Act in the circumstances presented by the Mid-Rivers Petition, where competition is thriving in a given area, is that the legacy ILEC's unbundling obligations should automatically go away.

A. In The Circumstances Presented By The Mid-Rivers Petition, The Relevant Area Is Necessarily Competitive And No Carrier Is Dominant

As discussed more fully above, the Mid-Rivers Petition presents circumstances where a second facilities-based LEC has been able to compete so effectively that it contends it has “substantially replaced” QC as the ILEC. This level of competition demonstrates unequivocally that QC is no longer the dominant carrier in Terry and that Terry is highly competitive. It is equally clear that the ILEC interconnection rules as specified in Section 251(c) of the Act can have no applicability to a non-dominant carrier. As discussed above, this situation, where a second facilities-based carrier is actively competing against the existing ILEC, will occur with increasing frequency. Once significant facilities-based competition has entered a market (this “significant” number is obviously far less than the 93% level achieved by Mid-Rivers), there is no conceivable legal or policy rationale for continued ILEC regulation of the former ILEC in the market.

B. In The Circumstances Presented By The Mid-Rivers Petition, The Legacy ILEC's Unbundling Obligations Should Be Removed Automatically

In the circumstances presented by the Mid-Rivers Petition, the legacy ILEC's unbundling obligations should simply go away. One way for the Commission to manage this process is to define standards like that proposed by Qwest in *ex parte* comments filed in the local competition

docket.<sup>24</sup> As Qwest has explained in that docket, an incumbent's obligation to provide unbundled network elements ("UNEs") should be removed automatically upon a straight-forward showing of competition.<sup>25</sup> Adequate competition can certainly be demonstrated in different ways and the measurements proposed by Qwest are obviously not the exclusive means. However, the Commission can and should define measurable thresholds at which an incumbent's obligation to provide UNEs is removed automatically and the Mid-Rivers Petition makes a showing far in excess of any reasonable standard. Accordingly, in the Terry exchange, the Commission should simply eliminate the unbundling obligations of QC, the legacy ILEC, instead of re-classifying Mid-Rivers as the ILEC.

VI. IN THE ALTERNATIVE, SECTION 10 FORBEARANCE IS THE APPROPRIATE MECHANISM TO ADDRESS THE STATUS OF THE ILEC IN THE CIRCUMSTANCES PRESENTED BY THE MID-RIVERS PETITION

Should the Commission not be inclined to accept Qwest's proposal and simply eliminate the legacy ILEC's unbundling obligations as advocated above, the Commission should, in the alternative, forbear from regulating QC as the ILEC in Terry pursuant to Section 251(h)(1) and forbear as well from dominant carrier regulation and the specific unbundling and resale requirements of Sections 251 and 271 in Terry – rather than re-classify Mid-Rivers as the ILEC in Terry pursuant to Section 251(h)(2).

A. The Section 10 Criteria For Forbearance

Section 10(c) of the Act requires that the Commission "forbear from applying any regulation or any provision of this [Act] to a telecommunications carrier or telecommunications

---

<sup>24</sup> See Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, from Cronan O'Connell, Qwest, dated December 7, 2004 in WC Docket No. 04-313 and CC Docket No. 01-338 and its attached Memorandum.

<sup>25</sup> *Id.*, Memorandum at 2.

service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets” if the following factors are satisfied:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;<sup>26</sup>
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers;<sup>27</sup> and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.<sup>28</sup>

In making the Section 10(a)(3) public interest determination, Section 10(b) requires that the Commission consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.<sup>29</sup>

B. Instead Of Re-Classifying Mid-Rivers As An ILEC, The Commission Should Forbear From Regulating Qwest As An ILEC In Terry, Including Forbearance From Applying Specific Section 251(c) And 271 Regulatory Requirements And Dominant Carrier Regulation

Based on the competitive facts of the Terry exchange discussed above, it is no longer appropriate to regulate QC as an ILEC pursuant to Section 251(h)(1) simply because of QC’s legacy status in Terry. The underlying assumptions of Section 251(h)(1) are no longer true. Mid-Rivers holds over 93 percent of its residential and business customers and QC obviously no longer enjoys market power in Terry. Mid-Rivers has been designated as a second ETC in Terry and QC’s network of telecommunications facilities has been overbuilt by Mid-Rivers utilizing its

---

<sup>26</sup> 47 U.S.C. § 160(a)(1).

<sup>27</sup> 47 U.S.C. § 160(a)(2).

<sup>28</sup> 47 U.S.C. § 160(a)(3).

<sup>29</sup> 47 U.S.C. § 160(b).

own facilities. Based on these changed circumstances, it is no longer equitable or reasonable to regulate QC differently than its competitors with respect to its operations in Terry. Nor should the Commission declare Mid-Rivers to be the incumbent. Instead, it should simply forbear from regulating QC as an ILEC pursuant to Section 251(h)(1), including the specific unbundling and resale requirements of Sections 251 and 271. The Commission should also forbear from regulating QC as the dominant carrier.<sup>30</sup>

The Mid-Rivers Petition and the related public record (including the record with respect to QC's Section 271 application for the state of Montana), together, satisfy each of the forbearance criteria in Section 10(a), as well as Section 10(d)'s requirement that the requirements of these provisions of Section 251(c) or Section 271 have been "fully implemented" by QC in the relevant area. First, enforcement of these regulations is not necessary to ensure that "the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory." As discussed above, it is plain that QC no longer occupies the dominant market position of an ILEC in Terry and that QC no longer has either the market power or the monopoly on facilities that is assumed in Section 251(c) and in Section 271. Nor is dominant carrier regulation of QC's local telephone services in Terry necessary to ensure that QC's rates and practices are just, reasonable and not unreasonably discriminatory. It is no longer necessary for QC or any other carrier to meet the selected Section 251(c) and Section 271

---

<sup>30</sup> This forbearance request includes the following Commission regulations: (1) the requirements and procedures under Section 214 that apply to dominant carriers, (2) Sections 61.38 and 61.41-61.49, which require dominant carriers to file tariffs on up to 15-days' notice with cost support; and (3) Sections 61.41-61.49, and 65, which impose price cap and rate of return regulation on dominant carriers.

requirements identified above in order to maintain or ensure “reasonable and nondiscriminatory charges, practices, classifications and justifications” in Terry.

Second, it is no longer necessary to enforce the Section 251(c) and Section 271 unbundling and resale requirements or dominant carrier regulations in order to protect consumers in Terry. Therefore, the criteria of Section 10(a)(2) of the Act are satisfied.

Third, it is also clear that the public interest will be served, and even advanced, if the Commission forbears from the requirements of Section 251(c) and Section 271 and dominant carrier regulation in Terry. Not only will this forbearance not harm competition, but forbearance would actually benefit consumers in the long run, since it will reduce the present regulatory asymmetry between competing carriers and eliminate the economic distortions caused by the imposition of intensive regulations that apply to some providers but that are not imposed on similarly-situated providers. Therefore, the criteria of Section 10(a)(3) of the Act are satisfied.

Finally, it is clear that Section 251(c) and Section 271 have been fully implemented in Montana, including Terry. Section 10(d) of the Act provides that the Commission may not grant an ILEC forbearance from Section 251(c) or Section 271 of the Act unless and until the Commission has determined that the requirements of Section 251(c) or Section 271 have been “fully implemented” by the ILEC. Separately, Section 10(b) requires that in making forbearance determinations, the Commission must consider whether forbearance from enforcing a statutory provision or regulation will promote competitive market conditions, including the extent to which such forbearance will “enhance competition among providers of telecommunications services.” Read in concert, Sections 10(b) and 10(d) therefore make clear that Congress intended that the Commission have the power to grant forbearance from Section 251(c) in circumstances where an ILEC had made its network facilities available to competitors, and where granting



forbearance from Section 251(c) would serve to promote competition. Both the Montana PSC and the Commission have previously determined that QC has fully implemented the requirements of Sections 251, 252 and 271 in the State of Montana, and that QC provides CLECs with nondiscriminatory access to its systems, databases and personnel.<sup>31</sup> In addition, the competitive state of the Terry exchange demonstrates that QC has fully implemented the requirements of Section 251 and Section 271. As a result, granting QC forbearance from dominant carrier regulation in Terry should also justify a finding that, for purposes of Section 10(d), the requirements of Section 251 and Section 271 have been “fully implemented” within the meaning of the statute.<sup>32</sup>

As demonstrated above, each of the Section 10(a) criteria is met and the Commission should therefore eliminate the regulatory asymmetry between QC and its competitors in Terry and grant QC forbearance from the specific Section 251(c) and Section 271 obligations identified above as well as from dominant carrier regulation.

## VII. THE COMMISSION SHOULD ESTABLISH RULES AND STANDARDS TO IMPLEMENT EITHER APPROACH DESCRIBED ABOVE

As described above, the Commission should process the Mid-Rivers Petition, and others like it in the future, pursuant to defined standards and procedures. When an adequate demonstration of competition is made, an incumbent’s obligation to provide UNEs should be removed automatically or, in the alternative, the Commission should adopt the forbearance

---

<sup>31</sup> See *In the Matter of Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, Memorandum Opinion and Order, 17 FCC Rcd 26303, 26582 ¶¶ 500, 501 (2002); see, e.g., generally, *In the Matter of Establishing Cost-Based Wholesale Prices for the Remainder of Qwest’s Network Elements*, Utility Division Docket No. D2002.7.87, Order No. 6435b, 2004 Mont. PUC Lexis 3 (Mont. Pub. Serv. Com’n Jan. 26, 2004).

<sup>32</sup> 47 U.S.C. § 160(a)(3).

approach outline above. Specifically with respect to the Mid-Rivers Petition and others like it in the future, the Commission can issue an “umbrella” order holding that, whenever a petition is submitted demonstrating that a non-ILEC has overbuilt the legacy ILEC utilizing its own facilities, it shall enter an order forbearing from regulating the legacy ILEC as the ILEC in that area pursuant to Section 251(h)(1) and forbearing as well from dominant carrier regulation and the specific unbundling and resale requirements of Sections 251 and 271 in that area. Such petitions could then be processed as adjudicatory matters applying the standards set forth in the initial “umbrella” order.

Again, with respect to certain universal service and access rate issues presented by the Mid-Rivers Petition or others like it, these should be addressed in the universal service and intercarrier compensation dockets, respectively, rather than this docket on a piecemeal basis.

#### VIII. CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Commission take the actions described herein.

Respectfully submitted,

QWEST COMMUNICATIONS  
INTERNATIONAL INC.

By: /s/ Timothy M. Boucher  
Andrew D. Crain  
Timothy M. Boucher  
Suite 950  
607 14<sup>th</sup> Street, N.W.  
Washington, DC 20005  
(303) 383-6608

December 30, 2004

Its Attorneys

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System, 2) served via e-mail on Janice M. Myles of the Competition Policy Division of the FCC at [Janice.myles@fcc.gov](mailto:Janice.myles@fcc.gov), and 3) served via e-mail on the FCC's duplicating contractor, Best Copy and Printing, Inc., at [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com) or [www.bcpiweb.com](http://www.bcpiweb.com).

/s/ Ross Dino

\_\_\_\_\_  
Ross Dino

December 30, 2004